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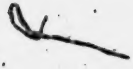

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 63

KIMBALL LAUNDRY COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 3-14, vol. IV) is reported in 166 F. 2d 856.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1948 (R. 15, vol. IV). The petition for a writ of certiorari was filed May 28, 1948. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the courts below erred in holding that the measure of compensation for the taking by the United States of the temporary use and occupancy of a laundry plant is the market value of the use and occupancy taken plus any destruction, damage and depreciation in the value of the building, machinery and equipment occasioned by the taking and in rejecting petitioner's claim either (1) for the full market value of the laundry, *i.e.*, of all the physical assets and the business, including the value of its trade routes and customers or (2) for the value of its trade routes and customers as an element of rental or use value of the laundry.

2. Whether, in a proceeding by the United States to condemn the use and occupancy of property for a specified period, extendible for additional yearly periods at the election of the United States, the courts below properly computed interest on the sum awarded for the initial period and each additional yearly period from the beginning of each period to the date of payment and on the award for damages occasioned by the taking from the date of the verdict until paid.

STATEMENT

In order to provide laundry and dry cleaning services for members of its armed forces, the

United States filed a petition on November 21, 1942, under authority of Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, sec. 201, 50 U.S.C. (1940 ed.) Supp. V, sec. 171a, to condemn the right to use and occupy certain property in Omaha, Nebraska. The property, known as the Kimball Laundry, and owned and operated by the Kimball Laundry Company, consisted of real estate, together with all improvements thereon and all personal property used in connection with the laundry (R. 1-5). The estate sought in the petition was the right to use and occupy the property for a period ending June 30, 1943, and for additional yearly periods for the duration of the national emergency at the election of the Secretary of War (R. 2). The district court granted the United States immediate possession of the property and, with A. L. Jacobberger (secretary and operations manager of the Kimball Laundry Company) as superintendent, the plant was operated as a military laundry (R. 5-8, 265-267). The term taken was extended for additional yearly periods, the last extension terminating on June 30, 1946 (R. 12-16, 65-67, 82-85). From time to time, the United States filed declarations of taking and deposited estimated compensation in court for the various periods taken (R. 16-18, 55-56, 67-68, 85-86).[1] The Kimball Laundry Company with-

[1] On May 11, 1943, the term was extended to June 30, 1944 (R. 12). On June 19, 1943, the United States deposited $30,140 as estimated compensation for the term ending June 30, 1943

drew the sums thus deposited without prejudice to its contentions in the case (R. 52-54, 58-59, 71-72, 88-90). On November 19, 1943, six appraisers appointed in accordance with Nebraska law to determine just compensation for the taking, made their report fixing compensation in the sum of $74,940.00 per year (R. 36-38). Both the United States and the Kimball Laundry Company appealed from the appraisers' award (R. 39-40). A jury trial to determine just compensation for the taking was not had until March, 1946, and on March 23, 1946, three days after the jury returned its verdict, possession of the property was returned to the Kimball Laundry Company (R. 183, 95, 97).

In the district court, the Kimball Laundry Company contended that the United States, while ostensibly taking only the right to use and occupy the property, had in legal effect, taken all of the company's physical assets and its business as well, including its trade routes and customers, and was obligated to pay the full market value of what was alleged to have been taken, estimated to be approximately $1,000,000 (R. 21-31, 45-49, 91-93; vol. IV, p. 5). The company also contended that

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(R. 16-18). On April 6, 1944, $50,000 as estimated compensation was deposited for the term ending June 30, 1944 (R. 55-56). On May 31, 1944, the term was extended to June 30, 1945, and $50,000 as estimated compensation to cover that term was deposited on August 10, 1944 (R. 65, 67-68). On May 28, 1945, the term was extended to June 30, 1946, and $65,000 as estimated compensation for that period was deposited on August 8, 1945 (R. 83, 85-86).

if the rental or use value of its laundry was to be used to measure compensation, the value of its trade routes and customers was admissible as an element of value (R. 93-94; vol. IV, p. 5). The Government contended that just compensation was to be measured by the market rental or use value of the laundry for the period taken plus the cost of restoring the plant and machinery to the condition in which they were on November 22, 1942, the date the United States took possession of the property (see R. 169-170; vol. IV, p. 5). The district court was in accord with the Government's theory as to the proper basis for determining compensation and its rulings and instructions to the jury were in substantial conformity with that theory (see R. 150-165, 231-232, 244; vol. IV, p. 5).

The proceedings before the jury may be summarized as follows: A. L. Jacobberger, Harry Jacobberger and Fred Jacobberger, the officers and principal stockholders of the Kimball Laundry Company (R. 265, 384, 443-444), testified that in their opinions the total value of the use of the laundry for three years and seven months (November 22, 1942, to June 30, 1946), including damages to the building, machinery and equipment, was $570,000 to $580,000 (R. 318, 425, 433). Among other evidence admitted on behalf of the Laundry Company was the fee value of the land (R. 314, 389), the original and the reproduction cost of the building (D. Ex. 19, R. 261-264), the cost of putting

the building back in the same condition as in 1942 (R. 304-306, see D. Exs. 41, 42, R. 408, 412-415, 419) and the difference between the value of machinery and equipment in November 1942 and in March, 1946 (D. Exs. 21 and 23, R. 247-251, 253-254, 258-260, 270-273; see also D. Exs. 43 and 44, R. 408-412, 415-419, 420). For the purpose of showing the capacity of the laundry plant, that it was a going concern and the volume of business, the Laundry Company was permitted to show its yearly receipts (*i.e.*, gross income) from 1936 through 1942 (D. Ex. 10, R. 229-235; D. Ex. 12, R. 238-242); the amount of laundry work done each year from 1932 through 1941, measured (according to type) by the number of pieces, pounds or bundles handled (D. Ex. 24, R. 279-284), the total number of customers being served on November 21, 1942 (D. Ex. 11, R. 235-237) and the prices being charged for laundry and dry cleaning services under O.P.A. ceilings in November 1942 (D. Exs. 28 and 29, R. 295-297). The trial court refused to allow the company to show the value of the "Kimball Laundry Company" (*i.e.*, the fee value of all the physical assets and the trade routes) before and after the taking (R. 315-316) or to show the value of the trade routes as a separate item (D. Ex. 14, R. 368-370).

Two witnesses on behalf of the United States testified that the fair rental or "use value" of the property for three years, seven months, including damages to the building, machinery and equipment,

was $253,066.80 and $257,000, respectively (R. 775-776; Gov't Ex. 24, R. 777-778; R. 733-735; Gov't Ex. 22, R. 735-737). Other evidence on behalf of the Government included estimates of the cost of repairing the building, machinery and equipment so that the plant would be in a good and efficient operating condition (R. 478-483, 491-496, 507-510, 520, 531, 544, 548-567, 571-572, 601-608, 611-620, 631-645, 690-692).

At the close of the trial, the district court instructed the jury generally as to the meaning of just compensation, *i.e.*, that it meant that the owner should recover the full and perfect equivalent in money of the property taken and that the owner was to be put in as good a position pecuniarily as if his property had not been taken, and that the measure of just compensation is the fair market value of the property at the time of the taking. The court then pointed out that while the standard of fair market value works very nicely in cases of fee takings, it is much more difficult to apply it in cases of temporary takings because, as a general rule, as in the instant case, there is no market for the property for a temporary use (R. 150-153; see also R. 154, 162, 164). As the court stated, "There is no evidence of any laundry having been sold on the market. That being so, you have to begin to look around to find another yardstick" (R. 153). Continuing, the court commented on various items of evidence admitted for the purpose of

showing the fair rental value or value of the use of the property for the period taken and the principles applicable in arriving not only at that value but also in arriving at the amount of depreciation (R. 154-161). The court further instructed the jury that since it had appeared on cross-examination that some of the owner's witnesses had considered certain elements which were not proper, the testimony of those witnesses, insofar as the improper elements were concerned, should be disregarded (R. 156-157, see also R. 167). Finally, the court instructed the jury to bring in a general verdict fixing a lump sum covering both the value of the use of the property and the damages to the property and to make special findings (1) as to the amount allowed as "annual rental or the amount that you determine for the use of the property per annum" and (2) as to the compensation payable for failure to return the property in the condition it was on November 22, 1942 (R. 161). Appellant made various objections to the instructions, particularly because of its refusal to permit consequential damages to be recovered and to recognize as an element of damage the destruction of the trade routes and customer lists (R. 165-166).

The jury returned its verdict on March 20, 1946, awarding a total sum of $297,776.03 for the taking of the property for a term beginning November 22, 1942 and ending June 30, 1946, including compensation for failure to return the property in the

condition it was in on November 22, 1942 (R. 95-96). Special findings were made fixing the annual compensation payable at $70,000, making the total rental for the entire period of 3.6 years the sum of $252,000 and fixing the amount payable for failure to return the property in the same condition as when taken in the sum of $45,776.03 (R. 96). On April 9, 1946, the court entered judgment on the verdict, allowing interest at 6% (1) on the amount adjudged due for the use of the laundry for the period November 22, 1942, to June 30, 1943, from the beginning of the period until paid and (2) on the amount due for each year thereafter from the beginning of that year until paid, giving credit to the United States for the sums deposited as estimated compensation (R. 101-107). Interest was also allowed on the sum of $45,776.03, the award for failure to return the property in the same condition as when taken, from March 20, 1946, until paid (R. 105).

As stated above, the United States returned the laundry to the company on March 23, 1946, and on June 11, 1946, it paid into court $98,124.27, the amount remaining due to satisfy the judgment (see R. 95, 97, 138).[2] The company was permitted

[2] This sum included compensation for the use or rental of the property to June 30, 1946, no deduction being made for the fact that the laundry was returned some three months prior to that date. By stipulation it was agreed that $200 would cover all damages to the property occurring between March 20, 1946, the date of the verdict, and the date of surrender of possession (R. 134-136). Judgment was entered on the stipulation fixing

to withdraw $75,000 of the latter sum without prejudice to its right of appeal (R. 137-140).

Upon appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the judgment was affirmed, the court holding that the United States had not taken the Laundry Company's business, trade routes or customers, that while the Government's occupation of the plant undoubtedly disrupted and damaged the company's business such damage is not compensable under the Fifth Amendment (vol. IV, pp. 8-10). Pointing out that, even if the taking of the temporary occupancy of the laundry were to be given the legal effect of the taking of fee title, damage to the company's business would not be compensable, the court held that what was taken in the instant case was the temporary use and occupancy of the laundry, that just compensation for the right to use and occupy property temporarily is the value on the market of the use and occupancy, together with compensation for any destruction, damage and depreciation in value of the property occasioned by the temporary use and does not include business losses (vol. IV, pp. 8-10). The court below also held that interest on the award had been properly computed (vol. IV, pp. 13-14).

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the compensation for the damage agreed upon and also providing for a credit to the United States of $18,089.55 for certain personal property owned by it which the Laundry Company had agreed to purchase at that price (R. 136-137).

ARGUMENT

1. It has been settled by this Court that injuries to a business, like other consequential losses resulting from the taking of private property for public use, are not compensable under the Fifth Amendment. *United States* v. *Petty Motor Company*, 327 U. S. 372, 377-378; *United States* v. *General Motors Corp.*, 323 U. S. 373, 379-380, 383; *United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266, 281-282; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Joslin Co.* v. *Providence*, 262 U. S. 668, 675-676; *Bothwell* v. *United States*, 254 U. S. 231. The rule is the same whether the interest taken in the property is the fee title or a temporary use and occupancy. *United States* v. *Petty Motor Company, supra*; *United States* v. *General Motors Corp., supra*. As this Court held in the *General Motors* case at p. 383, "proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent, * * * in this case [the case of the taking of a temporary use and occupancy], as in the case of the condemnation of a fee, must be excluded from the reckoning."

These decisions clearly support the judgment below. In order to escape their effect, petitioner seemingly argues that its business was destroyed and that the alleged destruction constituted a taking of the business. Thus, it seeks to present a novel question which should be decided by this Court by asserting that for the first time mentioned in any

reported case, the Government, while purportedly taking only a temporary use of building and machinery according to its petition in condemnation, "for all practical common-sense purposes actually took a going business institution" (Pet. 33, par. 6). Accordingly, petitioner attempts to distinguish the *Petty Motor* and *General Motors* cases, *supra*, on the theory that its claim for the value of its trade routes and customers is not properly classified as loss of profits, damage to good will, injury to the business or like consequential losses which were held not to be compensable in those cases (Pet. 34-35, pars. 1-2; see also Pet. 34, par. 7 and Pet. 28-29).[3] On the other hand, cases which in terms hold that "destruction" of a business is not a "taking" and consequently not compensable are sought to be distinguished by reference to various irrelevant factors. Thus, as to *Bothwell* v. *United States*, 254 U. S. 231, 233, where this court held that nothing could be recovered for "destruction of business" because "there was no actual taking" of the business, petitioner suggests, without any support in the opinion, that the condemnee in that case had the opportunity to carry on the business elsewhere. And, as to

[3] Whether petitioner's claim is, in fact, one for loss of good will or some other type of business loss is immaterial. However, it may be noted that while petitioner denies that it seeks to recover for loss of good will (Pet. 34, par. 7; Pet. 35, par. 2; Pet. 39, par. 1), the very cases on which it relied in the trial court as justifying the method used by one of its witnesses in valuing the trade routes (R. 368-370) show that the value placed upon the trade routes represents good will. See *Appeal of Metropolitan Laundry Co.*, 2 B.T.A. 1062 (1925); *Pioneer Laundry Co.* v. *Commissioner*, 5 B.T.A. 821 (1926).

Mitchell v. *United States*, 267 U. S. 341, where this Court again held that the destruction of a business does not constitute a taking, specifically stating as a fact that the former owners were unable to reestablish their business elsewhere (p. 343), petitioners assume that the decision was based solely upon a lack of statutory authority to "take" a business (Pet. 38, par. 11).[4] Petitioner's assertion that *Joslin Co.* v. *Providence*, 262 U. S. 668—where it was held that injury to a business is not an element of constitutional just compensation—"involves a rule founded upon a statute" (Pet. 37-38) is equally without basis.

United States ex rel. T.V.A. v. *Powelson*, 319 U.S. 266, is apparently distinguished on the ground that a "going" business was not destroyed by the taking in that case and that if it had been, compensation would have been awarded for the business (Pet. 36-37, pars. 7-8). Accordingly, petitioner relies upon the *Powelson* case, *supra*, and upon *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312 (Pet. 35-37, pars. 4-8). Neither of those cases supports petitioner's contention. In the *Monongahela* case, *supra*, a franchise was held to be such "an integral part" of a lock and dam that it was taken when the property was taken. See *Omnia* v. *United States*, 261 U. S. 502, 513. The

[4] In this connection, it may be noted that there is nothing in the Second War Powers Act any more than in the statute involved in the *Mitchell* case to authorize the taking of a business.

distinction between the *Monongahela* case, where the franchise was held to have been taken, and cases like *Mitchell* v. *United States*, 267 U.S. 341, *supra*, where the business was "destroyed" but not "taken," is clearly made in the *Powelson* case, *supra*, at pp. 281-283.[7] Thus petitioner attempts to establish a case warranting review by this Court by eliminating entirely the general principles found in the prior decisions of this Court and by limiting each case either to its particular facts or to the special terminology used by the Court to describe the loss for which recovery was denied. However, both courts below have ruled that petitioner's business was not taken and that its claim is one for damages to its business which this Court has held on numerous occasions to be noncompensable (R. 244; vol. IV, p. 8; see *supra* p. 11). Consequently, the decision of the circuit court of appeals presents no new question which should be settled by this Court, nor is the decision in conflict with any applicable decision of this Court. No question of recovery for damage to or destruction of a business was presented or passed upon in any of the other cases relied upon by petitioner (Pet. 39-40).[8]

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[7] Moreover, "as this Court has in several cases pointed out" the *Monongahela* case rested primarily upon the doctrine of estoppel. *United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266, 282, footnote 12.

[8] Petitioner refers (p. 32) to the Act of October 16, 1941, 55 Stat. 742, c. 445, as amended by Title VI of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 181, c. 199, secs. 601-602, 50 U.S.C. (1940 ed.) Supp. V, secs. 721-722, which

2. Petitioner's contention (Pet. 40-41) that interest on the award was improperly computed is without merit and presents no question for review by this Court. The use and occupancy condemned was for a specified term (beginning November 22, 1942, and ending June 30, 1943), extendible for additional yearly periods during the emergency at the election of the Secretary of War (R. 2). At the end of the initial period the term was extended for one year and again in 1944 and 1945 was extended for additional yearly periods (R. 12, 65, 82). Declarations of taking were filed and estimated compensation was deposited in court for each period (R. 16, 55, 56, 85). A few days after the jury's verdict the laundry was returned to petitioner (R. 95, 97). The trial court allowed interest on the sum found by the jury to be due for the initial term and each additional yearly period from the beginning of such period until the date of payment (R. 101-107). Interest was allowed on the sum awarded for damage, destruction and depreciation in the value of the property occasioned by the taking from the date of the verdict until payment (R. 105).

When property is taken prior to payment there-

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authorized the President to requisition military or naval equipment, supplies or munitions and machinery, tools or materials necessary to manufacture, service or operate such equipment, supplies or munitions. That statute has no bearing on this case, which is a proceeding brought at the request of the Secretary of War under Title II of the Second War Powers Act, *supra*, 56 Stat. 177, sec. 201, 50 U.S.C. (1940 ed.) Supp. V, sec. 171a, to condemn the temporary use of real property together with personal property located thereon or used therewith.

for, interest is allowed on the sum determined to be the value of the property as part of just compensation from the date of taking to the date of payment. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 306; *Albrecht v. United States*, 329 U. S. 599, 602. The provision in the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. sec. 258a, for interest on the sum finally awarded as the value of the property is merely a statutory embodiment of this rule (*Albrecht v. United States, supra*, at p. 605) which was properly applied in the instant case.

As the court below said (R. 13-14, vol. IV), "From a realistic viewpoint, what the Government took on November 22, 1942, was the right to use and occupy the laundry to June 30, 1943" and each time it extended the term it took the additional yearly period. The court was correct in holding that petitioner's right to compensation for use and occupancy for each period taken accrued successively as the terms were taken and that its right to compensation for injuries to and deterioration of its property attributable to Government use accrued at the end of the total term and did not, as petitioner contends, accrue on the total award on November 22, 1942.

3. In its questions presented, petitioner has referred to numerous rulings of the trial court which are alleged to be erroneous (Pet. 22-31).

Here, as below (see R. 6, vol. IV) most of the suggested errors are not argued in the brief. Insofar as they relate to the standard for ascertaining just compensation they are controlled by the ruling that business losses are not compensable (Questions III, IV, V, VI, IX, XII, XIII, XV, XVI, XVII, Pet. 23-31). Other suggested errors, such as the qualification of witnesses (Questions VII-VIII, Pet. 24) and the exclusion of rebuttal testimony (Question XI, Pet. 26) are matters resting within the discretion of the trial court and do not present questions for review by this Court.

It is urged that the trial court's conduct of the case was such that it destroyed all testimony and evidence introduced by defendant "from a common sense viewpoint" and calls for an exercise of this Court's power of supervision (Pet. 41-42). As in other questions suggested, petitioner's primary complaint is again exclusion of allegedly proper evidence of value, *i.e.*, evidence relating to its alleged business losses (see Pet. 42, par. 4; see also R. 165-166). Furthermore, as the court below stated (vol. IV, p. 11): "Taking the charge as a whole, however, we think it adequately apprised the jury of the applicable law and the considerations upon which a verdict could lawfully be based, and did not nullify the pertinent evidence admitted. Moreover, after listening for two weeks to conflicting estimates and opinions as to fair rental value and as to damages to and deterioration of

the plant and machinery attributable to the Government's use, the jury could hardly have had any illusions as to the issues of fact which were presented by the evidence. So far as the record shows, no attempt was made by the Government, during the trial, to minimize the usefulness or capacity of the laundry or to show that it was not completely equipped and in profitable operation when taken over by the Government. It insisted, however, that the Company was not entitled to have loss of trade routes and customers, expenses of litigation, and other consequential damages, considered in determining just compensation for the use and occupancy of the laundry." The jury's verdict of almost $300,000 for the use of the property for 2½ years and for damages to and depreciation of the property is about half the fee value of the physical property as claimed by petitioner (*i.e.*, approximately $600,000, see R. 314, 316, 260, 264, 273, 423-424) and represents about one-third the alleged fee value of the physical property and the business (see R. 21-31). While, as the court below pointed out (vol. IV, p. 14), it was much less than the amount claimed by petitioner, it was well within the evidence and exceeded by about $40,000 the highest estimate made by any Government witness (see R. 735-737).

CONCLUSION

The decision of the court below is correct, and presents no conflict or question which should be decided by this Court.

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JULY 1948

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QUESTIONS PRESENTED

In November, 1942, the United States condemned the right, on a temporary basis, to use and occupy the laundry plant of the petitioner in order to provide laundry and dry-cleaning services to members of the armed forces. The property was taken for a term ending in June, 1943, together with a right to extend for annual periods which was exercised, the property finally being returned on March 23, 1946.

After an extended trial, judgment was awarded the petitioner in the amount of approximately $300,000, a sum about half of the fee value of the petitioner's physical properties according to its own estimates. Petitioner was accordingly awarded for a three years, seven months use by the Government, half of the market value of the premises, and obtained the return of the entire plant and property. Although its facilities at the date of restoration were, according to it, worth $400,000, the petitioner now claims to be entitled to an additional award of approximately $300,000, and the questions presented are:

1. Whether the courts below were correct in holding that just compensation should be the value of the use of the property (computed on a fair annual rental value) plus damages for failure of the Government to return the property in the same condition as when it was taken, ordinary wear and tear excepted.

2. Whether the court below erred in disallowing compensation for the alleged destruction of value of trade routes, i. e., the patronage of customers served by the laundry.

3. Whether there was a reversible error committed in other rulings of the trial court.

STATUTE INVOLVED

The pertinent provisions of the Second War Powers Act (Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, April 11, 1918, 40 Stat. 518, 50 U. S. C. 171, and by Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, Sec. 201, 50 U. S. C. (1940 ed.) Supp. V, 171a) are as follows:

> The Secretary of War * * * may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, * * *. Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law.

STATEMENT

In order to provide laundry and dry-cleaning services for members of its armed forces, the United States filed a petition on November 21, 1942, under authority of Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, sec. 201, 50 U. S. C. (1940 ed.) Supp. V, 171a, to condemn the right to use and occupy certain property in Omaha, Nebraska. The property, known as the Kimball Laundry, and owned and operated by the Kimball Laundry Company, consisted of real estate, together with all improvements thereon and all personal property used in connection with the laundry except delivery equipment (R. 1–5). The estate sought in the petition was the right to use and occupy the property for a period ending June 30, 1943, and for additional yearly periods for the duration of the national emergency at the election of the Secretary of War (R. 2). The district court granted the United States immediate possession of the property, and, with A. L. Jacobberger (secretary and operations manager of the Kimball Laundry Company) as superintendent, the plant was operated as a military laundry (R. 5–8, 265–267). The term taken was extended for additional yearly periods, the last extension terminating on June 30, 1946 (R. 12–16, 65–67, 82–85). From time to time, the United States filed declarations of taking and deposited estimated

compensation in court for the various periods taken (R. 16–18, 55–56, 67–68, 85–86).[1] The Kimball Laundry Company withdrew the sums thus deposited without prejudice to its contentions in the case (R. 52–54, 58–59, 71–72, 88–90).

On August 23, 1943, the Kimball Laundry Company filed an answer to the condemnation petition alleging that its going business, although not described or referred to in the petition, had been taken by the United States, that the taking was not that of a temporary use, but rather of title to all of its business assets, so that the proper measure of compensation was not rental but was the full value of its laundry and dry-cleaning establishment as a going concern in the sum of $1,000,000 less credits to the United States for supplies already paid for and certain personalty not taken, leaving a net sum of $949,979.40 for the value of the physical property and the business alleged to have been taken (R. 21–31). In accordance with Nebraska law, six appraisers

[1] On May 11, 1943, the term was extended to June 30, 1944 (R. 12). On June 19, 1943, the United States deposited $30,140 as estimated compensation for the term ending June 30, 1943 (R. 16–18). On April 6, 1944, $50,000 as estimated compensation was deposited for the term ending June 30, 1944 (R. 55–56). On May 31, 1944, the term was extended to June 30, 1945, and $50,000 as estimated compensation to cover that term was deposited on August 10, 1944 (R. 65, 67–68). On May 28, 1945, the term was extended to June 30, 1946, and $65,000 as estimated compensation for that period was deposited on August 8, 1945 (R. 83, 85–86).

(appointed to determine just compensation for the taking) made their report on November 19, 1943, awarding the Kimball Laundry Company the sum of $74,940 per year for the estate taken and stating that they had made no allowance for damage for loss of patrons (R. 31–38). Both the United States and the Laundry Company appealed from the appraisers' award (R. 39–40) and the Company filed what it called a "petition in error" in which it asked the court to correct the award of the appraisers and enter judgment as a matter of law in the sum of $949,979.40, for the fair and reasonable value of its entire property plus costs and interests (R. 44–52).

A pretrial hearing was had at the request of the Kimball Laundry Company on May 17, 1945 (R. 55; see R. 90), and, at the beginning of the trial before a jury, the district court ruled on various motions pending before it (R. 183). The Government's motion to strike the answer and the petition in error was granted, the court stating that the Government's objection that the answer contained allegations of evidence and conclusions of law rather than facts was well taken and furthermore that he did not think pleadings were necessary (R. 76–82, 183). During the course of the trial (on March 18, 1946) the Kimball Laundry Company filed a second "petition on appeal" in which it alleged, among

other things, that it had built up highly valuable trade routes over the years by definite contractual relationships for laundry and dry-cleaning services, that those contracts were destroyed by the taking, that the fair, reasonable market value of the property as a going concern was over $1,000,000, that the United States had no right or authority to take a temporary use of the property unless it paid the full damages which were alleged to be over $1,000,000 (R. 91–93). It was further alleged that if the court determined that the value of a temporary use would be just compensation, then all elements of value inhering in the property, including the value of the trade routes, which was alleged to have been destroyed, should be given consideration and fully included (R. 93–95). A motion of the Government to strike this petition was granted (R. 95, 863).

The trial before the jury lasted two weeks, beginning March 4, 1946, and ending March 19, 1946 (R. 183, 863). The testimony may be summarized as follows:

Three officers of the Kimball Laundry Company, who were the principal stockholders (R. 265, 384, 443–444), gave their opinions as to the amount of compensation to which the company was entitled by reason of the taking of its property. A. L. Jacobberger, secretary and operations manager (R. 265), testified that the total value

of the use of the property for three years and seven months (November 22, 1942, to June 30, 1946), including damages to the property incurred during the Government's occupancy, was $570,000 (R. 318). Harry Jacobberger, president of the company, estimated that value to be $580,000 (R. 432–433; cf. R. 423–424), and Fred Jacobberger, former vice president in charge of sales promotion, expressed the opinion that such value was $570,000 (R. 454). All three witnesses arrived at their figures by allowing $220,799.09 for physical damage to the buildings, machinery, and equipment (R. 319–320, 343, 424, 456). The remaining $350,000 to $360,000 represented the witnesses' opinions as to value of the use of the property for three years and seven months at a rate of approximately $100,000 a year (R. 320, 345–346). The method by which the use value for the period of Government operation was computed by the three witnesses varied. For example, A. L. Jacobberger's estimate was composed of approximately $25,200 allowed for taxes and insurance at $7,000 per year (R. 320–321, 343), some $96,000 for depreciation (R. 324–325, 332–334, 351–353), miscellaneous expenses (storage of customers' clothing and the trucks, which were not taken, reconditioning the trucks and litigation expenses) in the sum of $16,400 (R. 326–327, 356), an allowance of $75,000 for expenses during the period which would elapse between the time of surrender

of possession by the Government and the time the laundry could be put back into operation (R. 330–331, 360–361), and an allowance of approximately $130,000 for a net return to the owners for the use of the property, based on capital investment in land, building, machinery and equipment (R. 332–333). Harry Jacobberger, in explaining what his estimate of $100,000 per year for the use of the property included, stated "nothing but the rental of a business" and that it was "the value that plant had to us as a going concern" (R. 426–427). Fred Jacobberger testified that in arriving at the sum of $100,000 per year he had allowed $26,000 per year to be set aside for depreciation, $7,000 per year for insurance and taxes, and a return of $65,000 per year on investment, representing 10% of $650,000, his value for the entire physical plant (R. 456–458). All three of these witnesses stated on cross examination that the fee simple value of the entire physical properties of the laundry company on the date of the taking was between $600,000 and $650,000 (R. 330, 424, 457).

For the purpose of showing the capacity of the plant, that it was a going concern and the volume of business, the laundry company was permitted to introduce exhibits showing the yearly receipts from various types of laundry and dry-cleaning services rendered from 1936 through 1942 (D.